

STATE OF MICHIGAN
COURT OF APPEALS

ALEXANDER V. LYZOHUB,

Plaintiff-Appellee,

v

NEZIH N. SALEM and CAROLE G. SALEM,

Defendants-Appellants.

UNPUBLISHED

January 7, 2003

No. 233291

Wayne Circuit Court

LC No. 00-014182-CK

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

In this breach of contract case, defendants appeal by leave granted an order of judgment entered in plaintiff's favor. The judgment followed the trial court's order granting summary disposition to plaintiff pursuant to MCR 2.116(C)(10) and a bench trial limited to the issue of damages. We affirm.

I. Basic Facts and Procedural History

This case arises from a contract for legal representation in a property dispute. In the underlying property dispute, the landowner split in two a parcel of commercial property adjacent to Plymouth Road in Livonia. Francis Rogers and Virginia Rogers purchased the parcel with access to the road. The Rogers, in turn, sold this parcel to Kok Chi Chau and Kan Yam Chau by land contract. Defendants purchased the other parcel, without access to the road, at a tax sale.

In June 1993, defendants hired plaintiff, a licensed attorney, to obtain an easement implied by necessity over the Rogers' parcel. Plaintiff and defendants entered into a written fee agreement for legal services. Defendants paid a \$300 retainer to plaintiff and agreed to an hourly rate of \$150. The relevant terms of the fee agreement provided:

2. Client shall pay attorney an additional bonus payment of \$1,000.00 upon the successful procurement of an ingress/egress easement for the subject matter property. This payment shall be made within fourteen (14) days of obtaining an instrument evidencing such easement.

3. Notwithstanding anything herein to the contrary, and excluding the retainer/bonus payment/reimbursement for costs provisions herein, all other attorney's fees due and payable hereunder are payable at the closing of the subject

matter property. In the event the property is taken off the market for any reason or not kept on the market in good faith, then all amounts owing shall become due and owing.

* * *

6. Statements for services rendered will be submitted to the Client on a regular basis. The Client agrees to pay all such bills submitted to him with 30 days of receipt and to pay a service charge of 1 ½ % per month thereafter on any unpaid balance.

Settlement negotiations between defendants and the Rogers failed. In August 1994, plaintiff filed a complaint on behalf of defendants against the Rogers and the Chaus, seeking an easement (“easement lawsuit”). In October 1995, the trial court entered an order granting summary disposition in favor of the Rogers. Defendants appealed. In an unpublished opinion, this Court reversed the trial court’s ruling and held that defendants were entitled to an easement.¹ Subsequent to this Court’s decision, settlement negotiations continued, but again, were unsuccessful. The easement lawsuit was dismissed for lack of progress without entry of an order establishing the easement.

During the course of litigation, plaintiff sent defendants copies of all pleadings. Plaintiff also sent defendants two bills. The first bill, for \$2,625, covered itemized services from June 3, 1993 to June 20, 1994. The second bill, for \$30,375, covered itemized services from June 21, 1994 to November 11, 1996. Defendants made a payment of \$244.05 in December 1995 and a payment of \$166.55 in August 1996. Plaintiff sent several more itemized bills between 1997 and 2000, but received no further payments.

In May 2000, plaintiff filed the complaint in this case alleging breach of contract and unjust enrichment seeking \$56,742.12 plus fees and costs. Plaintiff also sought an equitable mortgage on defendants’ property and appointment of a receiver.

In August 2000, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that pursuant to MCL 600.2145, and based on the attached billings and supporting affidavit, there was no genuine issue of material fact. The trial court granted plaintiff’s motion, reserving the issue of damages.

At the bench trial on damages, defendants admitted that they owed plaintiff attorney fees, but subject to a condition precedent. Defendants argued that attorney fees were not due until closing on the sale of the property, and closing had not occurred. Defendants further argued that if plaintiff had sent them regular and timely bills, which they contended he did not, they would have discontinued the lawsuit due to expense.

The trial court found that defendants agreed to pay plaintiff an hourly rate of \$150. The trial court also found that this Court’s ruling that defendants were entitled to an easement

¹ *Salem v Rogers*, unpublished opinion per curiam of the Court of Appeals, issued June 27, 1997 (Docket No. 193471).

together with defendants' failure to market the property in good faith triggered the condition precedent for payment contained in paragraph three of the fee agreement. The trial court further found the parties agreed that interest would accrue on unpaid balances. The trial court determined that interest began accruing six months after this Court's opinion was issued. The trial court also found that defendants would not likely have abandoned the easement lawsuit due to the expense nor could they have expected the legal work to be done at "bargain-basement rates."

II. Standard of Review

The interpretation of contractual language is a question of law subject to de novo review on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). The basic rule in interpreting contracts is to ascertain the intent of the parties. *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998). A clear and unambiguous contract must be construed according to its plain meaning. *Id.* Moreover, the plain meaning of an unambiguous contract may not be impeached with extrinsic evidence. *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997). If, however, contractual language is ambiguous, then extrinsic evidence may be used to ascertain the intent of the contracting parties. *Id.* at 607. "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

The trial court's findings of fact may not be set aside unless clearly erroneous. See *Sands Appliance Services v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000); MCR 2.613(C). Regard shall be given to the trial court's special opportunity to judge the credibility of the witnesses who appear before it. MCR 2.613(C).

III. Condition Precedent

Defendants first argue that the trial court erred in finding that the condition precedent to defendants' payment of plaintiff's fees was satisfied. We disagree.

A condition precedent is a fact or event that the parties intend must occur before there is a right to performance. *Yeo v State Farm Ins Co*, 219 Mich App 254, 257; 555 NW2d 893 (1996). The condition precedent at issue is contained in paragraph three of the fee agreement:

Notwithstanding anything herein to the contrary, and excluding the fee/bonus payment/reimbursement for costs provisions herein, all other attorney's fees due and payable hereunder are payable at the closing of the subject matter property. *In the event the property is taken off the market for any reason or not kept on the market in good faith*, then all amounts owing shall become immediately due and owing. [Emphasis added.]

The trial court correctly found that defendants failed to list the property for an appreciable amount of time and failed to make a concerted effort to sell the property within a reasonable time. Defendants only listed the property sporadically and briefly. Defendants did not place a "for sale" sign on the property until February 2000. Furthermore, the property could not be successfully marketed until the easement was ordered and properly recorded. Defendants

failed to timely take steps to effectuate the easement. Because the evidence demonstrates that defendants failed to market the property in good faith, the trial court's finding that the condition precedent occurred is not clearly erroneous.

IV. Intermittent and Delayed Billings

Defendants next argue that the trial court erred in finding that plaintiff's "grossly delayed billings" did not detrimentally affect defendants' decision on how or whether to proceed with the easement lawsuit. We disagree.

Defendants argue that if they had known the extent of plaintiff's fees, they would have terminated his services and indemnified the Rogers in return for an easement. However, the evidence belies this assertion. Defendants were aware of plaintiff's fees by the terms of the fee agreement. Additionally, defendants were aware of plaintiff's services performed on the case because plaintiff sent copies of all pleadings to defendants. Defendants never terminated plaintiff's services though they were aware of their ability to do so. In regard to defendants' argument that they would have terminated the lawsuit and indemnified the Rogers, the evidence demonstrates that negotiations between the Rogers and defendants continually failed and the Chaus refused to settle as well. The evidence also demonstrates that defendants would not likely have terminated the easement lawsuit absent settlement. Defendants had a significant financial stake in the property the value of which without the easement was virtually nil. With the easement, the value of the property would reach approximately \$200,000. Therefore, the trial court did not err in finding that plaintiff's failure to send defendants regular and timely bills did not prevent defendants from terminating plaintiff's services.

V. Interest

Defendants also argue that the trial court erred in awarding interest beginning six months after this Court issued its opinion in the easement lawsuit. We find that the trial court properly awarded interest from this point. Defendants' property could not be sold without an easement. The easement could not be effectuated until this Court's opinion was issued. The trial court imposed a reasonable time for defendants to effectuate the easement. Because defendants took no measures to effectuate the easement and failed to market the property in good faith during this time, the condition precedent contained in paragraph three was satisfied and plaintiff's fees became due. The interest began to accrue once plaintiff's fees became due. We find no error in the trial court's ruling.

VI. "Unclean Hands"

Defendants also argue that plaintiff has "unclean hands" because he intentionally waited for over two years to file this lawsuit until the statute of limitations had expired on any potential malpractice action. This issue is not preserved for our review because defendants did not raise it before the trial court. This Court does not review issues not addressed by the trial court. *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995). Therefore, we decline to address this issue.

Affirmed.²

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio

² On appeal, plaintiff and defendants request this Court grant them an opportunity for oral argument. Any party failing to timely file and serve a brief forfeits the right to oral argument. MCR 7.212(A)(4). While a party may submit a motion requesting oral arguments to the Court of Appeals pursuant to MCR 7.211, the brief on appeal is not the proper way to raise the issue.